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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 897 AND 906

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA

LACLEDE STEEL COMPANY, KRIM-KO CORPORATION, SCHALLER STEEL WORKS, INC., B & H, INC., STEWART-DURAVAN COMPANY, CLOAR GLASS COMPANY, INC., CLAUDE A. STAATS & SON, INC.,
Petitioners,

versus

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONERS' REPLY BRIEF TO THE OPPOSITION OF THE UNITED STATES

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REPLY ARGUMENT

The Government's opposition is based upon its contention that the decision of the Fifth Circuit is " * * * of no general importance * * * ". Yet the importance of the primary question presented is made clear in a case cited by the United States itself in its opposition (p. 9), *United States v. Rainwater*, 8 Cir. 325 F. 2d 62 (1963). There the District Court modified the findings of the Commission and the Government insisted to the Eighth

Circuit that the issue of the District Court's power to modify such findings was " * * * an issue of great importance to the Government and landowners throughout the nation" (325 F. 2d 62 at p. 63).

The issue presented in this case, i.e., the extent of an appellate court's power of review of the judgment of a district court adopting the findings of a commission, is basically the same issue, and we join with the Government's statement in the *Rainwater* case that such issues are of great importance to the United States and to landowners throughout the country.

The following are replies to the numbered paragraphs of the Government's opposition (pp. 8-11), using similar and corresponding numbering:

1. The Commission in the instant case did not "ignore" the existence of unrented portions of the condemned property. It gave consideration to that element, but also to other elements, and reached a conclusion at variance with "the Government's main theme."[1]

The "clearly erroneous" standard most certainly applies to the appellate court in this case, for it clearly presents the question of the proper scope of review by the Court of Appeals. The scope of the appellate court's

[1] As Judge Brown put it: (DB-A 38):

> "The Commission, from the running, ceaseless advocacy of the parties, the examination, re-examination, cross examination, re-cross examination and swabbing of all of the witnesses through hours and days of endless testimony, was thoroughly familiar with the Government's main theme. The Commission did not 'ignore' it. It was weighed and found wanting."

When the Fifth Circuit declared (DB-A 7), **"We have carefully read the record** so far as germane * * * " (emphasis supplied), one wonders how the court determined what portion was "germane" without carefully reading all, and whether the portions of the record which demonstrate that the Commission did not "ignore" the Government's principal contention did not escape the perusal of the author of the Court's opinion.

review in this case has been extended by that court to include a dissertation on the "Art of Appraisal" and goes far beyond the consideration of what is "clearly erroneous."

2. There is valid reason for consideration at this time of the Dock Board's contention regarding interest, for if this Court declines to review this question, the matter is settled against the Dock Board. Furthermore, if the award ultimately granted the Dock Board should fall somewhat short of the indebtedness to the Government, nevertheless the addition of interest thereto could well raise the award above the amount of the indebtedness.

3. The Government misstates the issue as to the awards to the lessees.

a) The awards to the lessees were not based on increased rentals paid by lessees for space leased after the condemnation. There is no evidence to support this contention and, in fact, the contention has not been made prior to its appearance in the Government's reply brief before this Court.

b) The findings of the commissioners and the judgment of the trial court are not based on enhanced value caused by the condemnation. In fact, there is no evidence to support such a contention. The evidence is to the contrary. (See discussion in the Petition for Writ of Certiorari, No. 906, pp. 17-21).

4. There is grave need for review by this Court of the incorrect application of the so-called "unit rule" made by the majority of the panel of the Fifth Circuit which heard this case. The Court is respectfully referred to pages 31-33 of the petition for certiorari where this question is discussed.

5. The Government's argument that the district court should determine which lessees are entitled to the "benefit of their bargain" is best answered in the words of Judge Brown, dissenting:

> "I only know one thing: this case will be back with us years and thousands and thousands of pages later."

The record is complete as to proof of the value of the lessees' interests. The awards in their favor should be affirmed.

CONCLUSION

The petitions for writs of certiorari should be granted.

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